

REMARKS

Claim 1 has been cancelled. No claims have been amended. Claims 58-70, 75-88 and 93-95 remain pending in the application.

Claim 1, 58, 59, 61, 63, 69, and 70 were rejected under 35 U.S.C. 102(b) as being anticipated by Augustine et al. (USPN 5620482). Claim 1 has been cancelled. Accordingly, this rejection is moot with respect to claim 1. This rejection is respectfully traversed for the following reasons.

Axiomatically, rejection of a claim for anticipation by a reference requires that the reference explicitly or inherently describe all of the elements, limitations, and relationships recited in the claim.

The Office action states that Augustine et al. teach all of the limitations of these claims. The applicants respectfully disagree. Augustine et al. do not disclose, suggest, or inherently include "a surgical drape".

In the response submitted in first class mail on 22 November 2002, a reference (Mahidal University SPECTRUM entitled "Ramathiboti Hospital Develops Simplified Surgical Drapes for Performing Caesarian Sections on HIV-Infected Mothers") established that the term "surgical drape" has a known meaning in the art. In this regard, according to the first sentence of the second full paragraph of the reference, a " '**surgical drape**' or sterile covering, is used to form an aseptic field to prevent transportation of microorganisms." As was pointed out in the response, a drape having this function is missing from Augustine et al.

Further, the applicants requested extrinsic evidence that a "surgical drape" is inherent in Augustine et al. The rule is that the extrinsic evidence "must make it clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill." *In re Robertson*, 49 USPQ2d 1949 (CAFC, 1999).

In response to the request for extrinsic evidence, there is only the statement in the latest Official Action that "the drape of the present invention and the drape of Augustine are formed of the same materials ... and *can* perform the same functions ... both drapes *can* be used as a sterile covering ...". (italics added for emphasis). These are conclusions, unsupported by a reference or by an affidavit or even by reasoning. They do not constitute extrinsic evidence required to support inherency. How is a surgical drape "necessarily" in the description of a foot drape? A foot drape traps air, while a surgical drape affords a sterile surgical environment. A foot drape is not deployed or positioned for defining and protecting a surgical environment. Patient warming and comfort are the objectives achieved by a foot drape, support of surgery is

not. See Augustine et al at col. 7, lines 54-62. Accordingly, the applicants repeat the request for introduction of extrinsic evidence that meets the requirements set forth in *In re Robertson*, or withdrawal of this rejection.

Claims 60, 62, 64-67, 75-85, 87, 88 and 93-95 were rejected under 35 U.S.C. 103(a) as being unpatentable over Augustine et al. (USPN 5620482) in view of Irani (USPN 5405370). Claim 68 has been rejected over Augustine et al in view of Collins. And, claim 86 has been rejected over Augustine in view of Irani and Collins. These rejections are traversed as follows.

The elements of obviousness have been set out in the previous response. Further, the remarks traversing the rejection are incorporated here by reference. These claims are all limited by "a surgical drape". Neither Augustine nor Irani teaches or suggests "a surgical drape".

The examiner's comments about the correspondence between Augustine's foot drape and the "surgical drape" of the claims are respectfully traversed for the reasons given above. The applicants acknowledge that the examiner is permitted to take "Official Notice" of facts outside the record; however, such notice is limited to such facts as are "capable of instant and unquestionable demonstration as being "well-known" in the art." MPEP 2144.03 Given the specific meaning of "surgical drape" as confirmed by the reference cited by the applicants, it is observed that the suggestions that a foot drape according to Augustine et al "*can*" perform the same function as a "surgical drape" and "*can* be used as a sterile dressing to prevent the transport of microorganisms" are merely the examiner's opinions. The examiner's quotation of the applicants' reference notwithstanding, there is nothing in the file that shows *how* the examiner came by this specific knowledge, or why it is capable of instant and unquestionable demonstration as being "well known" in the prior art. Accordingly, the applicants respectfully request the introduction of a reference or the examiner's affidavit to establish that a "foot drape" is, or suggests, a "surgical drape". According to MPEP 2144.03, second and third paragraphs, the examiner must now cite a reference, submit an affidavit, or withdraw the rejection.

Respectfully submitted



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